Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Respondent,

v.

ROMEL BOLGER,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. BASED ON THE SPLIT AMONGST THE CIRCUIT COURT OF APPEALS REGARDING THE LEVEL OF PROOF NECESSARY TO SUSTAIN THE GOVERNMENTS BURDEN IN CONSTRUCTIVE POSSESSION CASES, WHERE FINGERPRINT EVIDENCE IS AT ISSUE, WAS THE DEFENDANT ENTITLED TO JUDGMENT OF ACQUITTAL PURSUANT TO RULE 29 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

2. IS THE DEFENDANT ENTILTLED TO A REMAND FOR AN EVIDENTIARY HEARING PURSUANT TO THIS COURT'S RULING IN RULING IN MICHIGAN V. FISHER, PER CURIAM (NO. 09-91, 2009)

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STATEMENT OF THE CASE

On November 24, 2006, the Defendant Romel Bolger was shot and grievously wounded while in the driveway adjacent to the 1000 block of Levick Street in Northeast Philadelphia. (7A) Thereafter, the Defendant and co-defendants Kenneth Thompson and Latoya Johnson Kirkland were arrested and charged with Criminal Conspiracy and various Drug Offenses. The Defendant was charged in the United States District Court for the Eastern District of Pennsylvania and the case was assigned to the Honorable Timothy Savage. (6A)

The Defendant filed a Motion to Suppress the evidence that was seized inside 1053 Levick Street as the result of a warrantless search and seizure. The Motion was heard on November 8, 2007, and was thereafter denied by Judge Savage. (9A) A jury was selected and the Defendant and co-defendants then went to trial. Evidence commenced on January 3, 2008 and the verdict was returned on January 10, 2008, with the Defendant being found guilty on Count Three, Possession with Intent to Distribute Cocaine, and on Count Four, Possession with Intent to Distribute Cocaine Base ("Crack"). The jury found the Defendant not guilty on Count One, Criminal Conspiracy; Count Two, Managing a Drug House and

on Count Five, Possession of a Gun in Furtherance of a Drug Crime. Thereafter the Defendant with counsel again appeared before Judge Savage on April 23, 2008. At that time the Court sentenced the Defendant to a term of 110 months in Federal Prison and to five (5) years on supervised Release Thereafter a timely Notice of Appeal was filed.

On November 24, 2006, someone opened fire upon this Defendant and wounded him causing him to be taken to a local hospital. Police came to the scene which was the driveway area that serviced the rear entries on the 1000 block of Levick Street in Northeast Philadelphia. (7A) Thereafter the police made a warrantless entry into 1053 Levick Street and found drugs including cocaine, cocaine base and a some marijuana. At the hospital, police went through the clothing of the Defendant and found one jar with marijuana in it. The Defendant's fingerprints were found on a scale, a sneaker bag and on a drinking glass inside the kitchen of 1053 Levick Street.

Police Officer Erbele responded to a radio call and found the wounded Defendant on the center median strip near Levick Street and Summerdale Avenue on November 24, 2006, at about 6:40 p.m. (7A) Officer Erbele traveled to the nearby driveway on the 1000 block of Levick Street and found evidence of a shooting including a .9 millimeter gun. A decision was made to enter the house located at 1053 Levick Street, Philadelphia, Pa. Upon entry, a gun was

found on the floor of the first floor by the front door and white powder was found in the middle bedroom

Police Officer Bowes arrived at the driveway where four black males were standing and found a gun nearby. Officer Bowes traveled to Frankford Hospital and saw the Defendant and went into the Defendant's clothing bag and found a jar of marijuana with the jar having a butterfly on the lid. There was no cocaine on the person of the Defendant or in his clothing and he had no weapons.

Officer Erbele observed an SUV in the driveway of 1053 Levick. Civilian Stacy Hummell lived nearby, heard gunshots and saw two black males running through the driveway. She said that the SUV had its door open and a boy was in the car and she then observed a man come and retrieve the boy. Toni Corley testified that co-defendant Thompson was the father of her six year-old and that the boy was with the co-defendant on Thanksgiving Day 2006 which was the time frame in question. Police Officer Hunter entered the property and looked in areas where a "body" might be found. Instead drugs were found.

Police Officer Galazka noted that over $176,000.00 was found in the house and that an identification card belonging to co-defendant Thompson together with other proof of residency relating to Latoya Kirkland were found in the house as well. A mini DVD from the SUV was found with the executive producer being one "Big Hommie". Other evidence identified

Big Hommie as the Defendant Bolger. Detective Casee found further proof of residency for co-defendants Kirkland and Thompson. Sgt. Schickel dusted for prints. Clifford Parson, a civilian employee of the Philadelphia Police Department testified that the Defendant's prints were found on a scale, a sneaker bag and on a drinking glass in the kitchen. Prints from co-defendant Thompson and from one Carol Wyatt were also found. However, Mr. Parson also noted that seven fingerprints could not be identified to anyone, and that the Defendant's prints were found on only one scale and that Mr. Parson did not know if the Defendant touched the scale inside of 1053 Levick Street.

Brenda Kirkland was the Aunt to co-defendant Latoya Kirkland and testified as to Latoya's rental of 1053 Levick Street.

Brenda Kirkland also noted that her cousin Kenny, the co-defendant Thompson moved in as well. She identified the Defendant as "Hommie" and said that he was friends with co-defendant Thompson and that the Defendant knew Latoya Kirkland as well. Mildred Wyatt said that Carol Wyatt was her sister and that the Defendant Bolger was the boyfriend of Carol Wyatt.

REASONS FOR GRANTING THE WRIT

1. There exists a split in the Circuit Court of Appeals regarding the level of proof necessary to sustain the Governments burden of proof in constructive possession cases where fingerprint evidence is at issue.

While the Government is entitled to all reasonable inferences as the verdict winner, there is nothing in the law or Rules of Evidence which would even remotely suggest that the Government is entitled to any unreasonable inferences. Moreover, even direct evidence should not be taken to sustain a verdict when the evidence as a whole leads a jury to base its verdict on speculation, conjecture and surmise. Eng Jung v. United States, 46 F.2d 66 (3rd Cir. 1930); Graceeffo v. United States, 46 F.2d 852 (3rd Cir. 1931), and United States v. Heithaus, 391 F.2d 810 (3rd Cir. 1968).

Certainly, the Government must prove beyond a reasonable doubt every element of a charge offense. See, In Re Winship, 397 U.S. 358 (1970). In United States v. Wise, 515 F.3d 207 (3rd Cir. 2008), this Court held:

> The defendants first argued that the District Court erroneously denied their motions for judgments of acquittal because the evidence presented at trial was insufficient to permit the jury to find them guilty beyond a reasonable doubt. We review a defendant's challenge to the sufficiency of the evidence in the light most favorable to the government. *United States v. Bobb*, 471 F.3d 491, 494 (3rd Cir. 2006). We will sustain the verdict "if rational trier of fact could have found the defendant guilty beyond a reasonable doubt and if the verdict is supported by substantial evidence." I. D... However, it is not our role to weigh the credibility of the witnesses. Indeed, we must be ever vigilant... Not to unsurp the role of the jury by weighing credibility and assigning weight to the evidence, or by substituting [our] judgment for that of the jury." *United States v. Brodie*, 403 F.3d 123, 133 (3rd Cir. 2005).

The problem for the Government in this case is that a rational trier of fact could not have found the Defendant guilty beyond a reasonable doubt and the secondary problem for the Government was that the verdict was not supported by substantial evidence. The Wise Decision should be held to mean that where there is substantial evidence presented, that a rational trier of fact should find the verdict consistent with that evidence. However, where there is not

substantial evidence presented but rather where the Government's presentation involves innuendo but not fact and where the Government's evidence only establishes that the Defendant was physically proximate at some point in time to a scale that might be used to weigh drugs but where the evidence could not otherwise establish that the Defendant possessed drugs, a rational trier of fact should not have convicted the Defendant as there was insufficient evidence to support that verdict and the Trial Court erred when it did not grant the Defendant's Rule 29 Motion at the conclusion of the Government's case.

The standard of review to be employed by this Court is the same as the standard applied by the Trial Court in the ruling on the Rule 29 Motion. See, United States v. Valadez-Gallegos, 162 F.3d 1256 (10th Cir. 1998); United States v. Hernandez, 146 F.3d 30 (1st Cir. 1998). In reviewing same, the Appellate Court considers all the evidence, direct and circumstantial, and resolves all evidentiary conflicts in favor of the verdict but does not weigh the credibility of witnesses or assess whether the prosecution succeeded in eliminating every possible theory consistent with the defendant's innocence. United States v. Moran, 312 F.3d 480 (1st Cir. 2002). A conclusion that a rational jury could find the defendant guilty beyond a reasonable doubt may be predicated in whole, or in part, on circumstantial evidence. United States v. Singh, 222 F.3d 6 (1st Cir. 2000).

Clearly, what evidence the Government did produce at trial that they might deem supportive of their contention that Mr. Bolger constructively possessed the contraband is insufficient as a matter of law. In United States v. Jenkins, 90 F.3d 814 (3rd Cir. 1996), the Third Circuit Court of Appeals reversed the defendant's conviction based on sufficiency of the evidence. The issue in that case, as in the case at bar, is whether the evidence was sufficient to establish constructive possession. "Constructive possession necessary requires both 'dominion and control' over an object and knowledge of that object's existence." United States v. Lafelice, 978 F.2d 92, 96 (3rd Cir. 1992), citing United States v. Brown, 3 F.3d 673, 680 (3rd Cir. cert. denied 510 U.S. 1017, 114 S.Ct. 615 (126 L.Ed.2d 579 1993)). "Dominion and control are not established, however, by 'mere proximity to the drug, or mere presence on the property where it is located, or mere association with the person who does not control the drug or property.'" United States v. Jenkins, 90 F.3d at 818 quoting Brown, 3 F.3d at 680.

In Jenkins, Philadelphia police officers responded to a call that shots were being fired near an apartment building. The officers upon responding, saw two individuals, one of whom was holding a hand gun. The individual ran into an apartment building and into one of the apartments. Upon entering the apartment, the officers observed Jenkins seated on a couch wearing boxer shorts and a tee shirt. On the

coffee table before him were three bags containing a total of 55.3 grams of cocaine, 42 grams of non-cocaine white powder, 2 triple-beam scales, 2 loaded .38 revolvers, and packaging materials. No other paraphernalia was found. In holding that this evidence was insufficient to prove constructive possession, the Court found that the evidence merely showed that Jenkins was an acquaintance of the gunman and was found physically near the drugs and drug distribution paraphernalia, "but those are insufficient facts from which to infer dominion and control over the drugs." See, also, United States v. Brown, 3 F.3d 673 (1993).

In Brown, supra., the Third Circuit found the evidence to be insufficient as against co-defendant Ama Baltimore. The evidence against Baltimore included the fact that she possessed a key to the house in question; that she arrived at the house during the search and attempted to enter the house using her key; that a pair of women's shorts and a switchblade in those shorts were found in the house in a room where no drugs were found and that Baltimore admitted that they both belonged to her and that Baltimore said "but you can't arrest me because I am in my own house" and further demonstrated that the house was being used as a "cut house." That is a house where large quantities of drugs were stored, cut and packaged for sale.

In pertinent part, the Court said:

> However, "mere proximity to the drug, or mere presence on the property where it is located or mere association with the person who does control the drug or the property, is insufficient to support a finding of possession" [citing United States v. Walker, 993 F.2d 196 (9th Cir. 1993).

The Court then held:

> At best, the evidence against Baltimore supports a finding that she resided at the Brown home and knew drugs were in the house. However, the evidence, viewed in the light most favorable to the government, cannot support a finding that Baltimore had dominion and control over those drugs.

The Court in Brown (Ama Baltimore) cited a Decision by the Court of Appeals for the Ninth Circuit in United States v. Vasquez-Chan, 978 F.2d 546 (9th Cir. 1992). In that case, D.E.A. agents identified a large narcotics trafficking network. During the course of the investigation, a D.E.A. agent infiltrated the drug organization and posed as a buyer of a large quantity of cocaine. At no point in time was the defendant present or a participant in any of the drug-related negotiations. During a subsequent surveillance, the agents went to a residence in order to secure it. They observed the defendant and an individual referred to as Gaxiola in the kitchen of the home. A further search revealed approximately 600

kilograms of cocaine in a back bedroom. Vasquez-Chan submitted that she had resided in the house for about three months and worked as a caretaker for another who resided in the house. She further admitted that the cocaine had been delivered by messengers about three days earlier, though she could not describe the messengers to the agents. The cocaine was delivered in large, round containers. Some of these containers were sealed; some were not. The evidence revealed that Gaxiola had touched several of the containers. In fact, twelve of this female's fingerprints were lifted from six of the containers. One of those fingerprints was found on the inside surface of the container cover, which had been used to transport the large quantity of cocaine. Neither Vasquez-Chan nor Gaxiola's fingerprints were found on the cocaine.

In ruling that the evidence was insufficient to support the conviction of either Vasquez-Chan or Gaxiola, the Court found that the fingerprints of Gaxiola on the canisters still did not prove constructive possession. Although there was proof that she touched those canisters at some point, the evidence failed to establish "any reason to believe that an innocent explanation of that evidence was any less likely than the incriminating explanation advanced by the government; accordingly it cannot establish Gaxiola's guilt beyond a reasonable doubt." In so ruling, the Court stated: "The presence of her fingerprints on the containers by no means establishes that

she exercised 'dominion and control' over the contents, nor would the fact that she touched or moved the lid of an opened cannister. Even when the fingerprint evidence is combined with the other evidence against Gaxiola, it is legally insufficient to establish in the mind of a reasonable juror, beyond a reasonable doubt, that she possessed the cocaine located in the house in which she was staying." Vasquez-Chan at 551-552. In the same vein, the Court also rejected the theory that she aided and abetted the commission of the crime.

Turning to the facts in the case at bar, it is clear that the Government's evidence is similarly insufficient to establish that Mr. Bolger constructively possessed the narcotics. He had no connection to the residence, there were no bills found in his name, no personal effects attributed to him were found, and there was no testimony to establish that Bolger had a connection to the location. Furthermore, the fingerprints were not found on any of the narcotics. There was a print obtained from a drinking glass and a print obtained from a scale. This is insufficient, under law, to conclude that Bolger had dominion and control over the narcotics, beyond reasonable doubt. In fact, the evidence only shows that at some point in time Bolger had touched a scale and had a glass of water. Any other inference is purely speculative. See, Vasquez-Chan.

To highlight this conclusion, one only needs to look at United States v. Beverly, 750 F.2d 34 (6th Cir. 1984). In this case police officers executed a search of a residence belonging to Henry Hatfield. Mr. Beverly and another individual were present in the kitchen. During a pat-down search of Beverly, the officer saw in a trash can located between Beverly's feet, an unzipped purse containing a handgun and another handgun underneath the purse. The guns were examined and it was discovered that one of Mr. Beverly's fingerprints was on one of the guns. Beverly was charged with being a felon in possession of a firearm. In ruling that the Court should have granted Defendant's Motion for Judgment of Acquittal, the Court found that the fingerprint on the firearm was insufficient to prove constructive possession of the firearm. In so holding, the Court stated:

> The government's evidence has not established Beverly's constructive possession of the gun for three reasons. First, the government has not proven that either the kitchen, the wastebasket which contained the gun, or the gun itself was within Beverly's direct control. Second, the government has not established that any of those objects was within Beverly's indirect control. See id. (stating that possession can be direct or indirect). Third, the evidence, when viewed most favorably for the government, does not establish constructive possession.

> Instead it establishes only that Beverly was in the kitchen of Hatfield's residence, that Beverly was standing close to a wastebasket which contained two guns, and that Beverly had at some point touched one of the guns. This is not sufficient. Consequently, the government has not proven beyond a reasonable doubt that Beverly constructively possessed the gun. Because the government has not established constructive possession, we need not consider whether the government's proof permits the inference of constructive "receipt" under Section 922.

The Decision in United States v. Hall, 473 F.3d 1295 (10th Cir. 2007), is helpful. In that case, the FBI executed certain search warrants on June 7, 2001, and the defendant and multiple other defendants were arrested and charged in a drug conspiracy. The defendant Hall was charged with Possessing with the Intent to Distribute cocaine base on April 7, 2001. The Court summarized the evidence and its shortcomings as follows:

> The government did not introduce into evidence crack cocaine related to the alleged April 7th transaction, eyewitness testimony or video surveillance evidence putting Mr. Hall in possession of crack cocaine on or around April 7th; or testimony from any per-

> son alleged to have purchased crack cocaine from Mr. Hall on or about that date. . . .

The Court then went on to address the government's intentions:

> The government suggests that other evidence supports the jury's conclusion that Mr. Hall possessed crack cocaine: (1) law enforcement officers intercepted a call on April 9, 2001 during which Mr. Hall seeks to buy powder cocaine from Mr. Small; (2) law enforcement officers intercepted a call on April 10th, during which Mr. Hall and Mr. Small discussed how to cook powder cocaine; (3) a witness testified that she delivered cocaine (powdered or crack - she was not sure which) to Mr. Hall at Mr. Small's request at some other time; and (4) on June 7th, law enforcement officers executed a search warrant at Mr. Hall's residence and found drug paraphernalia including scales with cocaine residue on them and $2,700.00 in cash. While this evidence may be sufficient to establish that Mr. Hall possessed crack cocaine at some time, the indictment charged Mr. Hall with possession and distribution on or about April 7, 2001. None of this evidence shows that Mr. Hall possessed or distributed crack cocaine at that time. . . .

Clearly, cocaine and cocaine base were found at 1053 Levick on November 24, 2006. However, and using the rationale of Hall, supra., the Government did not establish that the Defendant possessed any of those drugs on that date. It was not his home; the Government could not prove that he was in the home on the day in question; the drugs were not on his person; there was no witness to any drug transaction or alleged transaction and most importantly, the alleged link to the crime, the fingerprints on the scale can only be said to have been present, but there was no evidence that they were put on the scale on the day that the Defendant was said to have possessed the drugs, to wit, November 24, 2006, and in fact, there was no evidence that the Defendant ever was physically proximate to that scale on that date.

Two cases, one from the 11th Circuit and one from the Third Circuit, because they can be distinguished, are relevant to this analysis. In United States v. Thompson, 473 F.3d 1137 (11th Cir. 2006), the defendant was found to have possessed certain drugs in his apartment even though he was not present at the time that a search warrant was executed. The 11th Circuit found that the evidence linked the defendant Thompson to the very location the drugs were found. The Court said:

> Documents that were indisputably Thompson's were found beside the powder and crack cocaine on one of the beds in the

> apartment. Those documents establish a continuous relationship between Thompson and Deidric Park, a resident of the apartment . . . Other documents involving Thompson's Red Cross Relief application were dated one day before the apartment search, which was shortly after the informant purchased drugs at the apartment. Thompson never did explain why the address he listed on the Relief application papers differed from the one on the traffic citations. [Thompson testified.] The third document of Thompson's that was found next to the powder and crack cocaine on the bed was a list of phone numbers from his cell phone. An officer testified that such lists were routinely used by drug dealers to contact purchasers. . . .

In the instant matter, the Government could produce no evidence that linked this Defendant to 1053 Levick Street; at most, the evidence established that the Defendant knew the occupants of that home and that he was friendly with them. However, it was not his home; he did not live there and nothing presented by the Government would have established that he used the home in any way, let alone a significant way. While the Government presented evidence that the Defendant was said to have called certain people; the Government presented no evidence with regard to call lists, purchasers, other drug dealers or any-

thing else. In short, the Government in Thompson, supra., proved that the defendant exercised dominion and control over the drugs while the Government in the case at bar did not do that and that is exactly why the Court erred when it failed to grant a Rule 29 Motion.

In United States v. Iglesias, 535 F.3d 150 (3rd Cir. 2008), the government worked with a cooperating witness and eventually executed a search warrant at 3625 Red Lion Road, Apt. A, which was in a duplex owned by the defendant's brother. In the master bedroom, agents found a wallet containing Iglesias's driver's license and a bag of methamphetamine. The defendant was convicted and challenged the sufficiency of the evidence. The Court noted that the jury could convict Iglesias of the possession charges if it concluded that he actually or constructively possessed the methamphetamine and that constructive possession required an individual to have the power and intent to exercise both dominion and control over the object he is charged with possessing. The Court reviewed the evidence in a light most favorable to the government and said:

> . . . We find that the overwhelming direct and circumstantial evidence tied Iglesias to Apt. A. First, Shisler (cooperating witness) testified that he purchased drugs from Iglesias at Apt. A and that Iglesias lived there alone. Second, virtually every room con-

> tained damning evidence that Iglesias exercised dominion and control over Apt. A and its contents. . . . The master bedroom contained more drugs, more bags, and a large quantity of cash, along with Iglesias's driver's license and several casino cards in his name. . . . Finally, one of Iglesias's own witnesses testified that he had heard Iglesias refer to Apt. A as "his apartment."

Again, this case stands for the proposition that an individual need not be found at a residence where drugs are for that person to be found guilty of possessing the drugs, but rather, whether the Government can prove by the evidence that the defendant exercised dominion and control over the contraband. Mr. Iglesias certainly did that. However and in this matter, the Government again produced nothing which would have tied this Defendant to 1053 Levick Street and in fact, the evidence revealed that the Government did not know when the Defendant's fingerprint was placed on the scale in question or where it was placed, to wit, whether it was placed at 1053 or at some other location. There was no evidence establishing the Defendant's presence inside 1053 at any relevant time to the drug conspiracy.

Thus, and where the Thompson and Iglesias cases certainly establish what is necessary to demonstrate that there is sufficient evidence to prove dominion and control, the facts in the matter before this Honorable Court clearly reflect that the evidence did not come close to establishing dominion and control over the drugs in question.

Accordingly, the Writ of Certiorari should be granted as there exists a split in the Circuit Court of Appeals regarding the quantum of proof necessary in constructive possession cases.

2. **Defendant is entitled to a remand to the District Court regarding the exigent circumstances present during the search of the residence at 1037 Levick Street, Philadelphia, PA in light of the Court's ruling in Michigan v. Fisher, per curiam (No. 09-91, 2009)**

In Michigan v. Fisher, the Supreme Court reaffirmed the that exigent circumstances, such as the "emergency aid exception" to the warrant requirement of the Fourth Amendment to the United States Constitution, will justify entry into a home without a warrant. In interpreting this exception, the Court cited to its seminal case of Brigham City v. Stuart, 547 U.S. 398 (2006).

In Brigham City v. Stuart, 547 U.S. 398 (2006), police officers responded to a noise complaint in the

early morning hours. As they approached the house, the officers heard an altercation from inside of the house. The officers thought it was some kind of fight. The officers then observed an actual fight through the window. The Court found it "'plainly reasonable' for the officers to enter the house and quell the violence, for they had 'an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning.'" Michigan v. Fisher, per curiam (No. 09-91, 2009) quoting Brigham City v. Stuart, 547 U.S. 398 (2006).

Similarly, in Michigan v. Fisher, the officers actually witnessed Fisher, inside of the house, screaming and throwing things. The back door was locked, and a couch was blocking the front door. The officers noticed a cut on Fisher's hand. The officers also noticed a pickup truck in the driveway with its front smashed, damaged fence posts, three broken windows on the house, with glass outside, and blood on the hood of the pickup truck and on clothes inside of it. Based on Brigham City v. Stuart, 547 U.S. 398 (2006) and those facts, the Court held that a warrantless entry would be reasonable under Fourth Amendment standards.

CONCLUSION

In the present case, there are no such facts, and therefore the Third Circuit Court of Appeals' reliance on Brigham City v. Stuart, 547 U.S. 398 (2006) is misplaced, especially in light of Michigan v. Fisher, per curiam (No. 09-91, 2009).

Respectfully submitted,

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APPENDIX

APPENDIX A – JUDGMENT, FILED DECEMBER 18, 2009

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-2214

UNITED STATES OF AMERICA

v.

KENNETH THOMPSON

a/k/a KR

a/k/a Ken Rock

Kenneth Thompson,

Appellant

08-2215

UNITED STATES OF AMERICA

v.

ROMEL BOLGER,

a/k/a Damir Miller
a/ka/ Romez Bolger
a/k/a Charles Connor
a/k/a BH
a/k/a Big Hommie
a/k/a James McCarty

Romel Bolger,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Nos. 2-07-cr-00388-1, 2-07-cr-00388-3, 2-07-cr-00388-2)
District Judge: Honorable Timothy J. Savage

Before: SLOVITER, JORDAN and WEIS, Circuit Judges

JUDGMENT

The cause came on to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted under LAR 34.19(a) on December 14, 2009.

On consideration whereof, it is now hereby ORDERED and ADJUDGED that the orders of the District Court entered December 28, 2007, and judgments of the District Court entered April 17, 2008 and April 24, 2008, be and the same are hereby affirmed. All of the above in accordance with the opinion of this Court.

Attest:

DATED: December 18, 2009 /s/ Marcia M. Waldron
Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-2214

UNITED STATES OF AMERICA

v.

KENNETH THOMPSON

a/k/a KR
a/k/a Ken Rock

Kenneth Thompson,

Appellant

08-2215

UNITED STATES OF AMERICA

v.

LATOYA JOHNSON KIRKLAND,
Appellant

08-2294

UNITED STATES OF AMERICA

v.

ROMEL BOLGER,

a/k/a Damir Miller
a/k/a Romez Bolger
a/k/a Charles Connor
a/k/a BH
a/k/a Big Hommie
a/k/a James McCarty

Romel Bolger,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Nos. 2-07-cr-00388-1, 2-07-cr-00388-3, 2-07-cr-00388-2)
District Judge: Honorable Timothy J. Savage

Submitted Under Third Circuit LAR 34.1(a)
December 14, 2009

Before: SLOVITER, JORDAN and WEIS,
Circuit Judges

(Filed: December 18, 2009)

OPINION

SLOVITER, *Circuit Judge.*

Romel Bolger, Latoya Kirkland, and Kenneth Thompson appeal the District Court's denial of their motion to suppress evidence, including numerous kilos of cocaine, used against them at trial; Bolger and Thompson appeal the sufficiency of the evidence upon which their convictions for possession with intent to distribute cocaine and cocaine base rest; and Bolger appeals to the District Court's enhancement of his Guidelines calculation for possessing a firearm in connection with a drug trafficking offense.

I.

Background

After shots were fired near the intersection of Levick Street and Summerdale Avenue in Philadelphia, police found Bolger on the median of Levick street, bleeding from the mouth and chest from a gunshot wound. In the nearby driveway of the house at 1053 Levick Street officers found a handgun, shell casings, and two cars with bullet holes, including a blue Ford Expedition with both front doors open.

Officers Barclay and Erbele interviewed a witness at the scene who, the government asserts, told them that there had been a shoot-out between two groups of men, after which someone involved may have pulled a child from the Expedition and then entered 1053 Levick Street. Those officers also saw lights on in 1053 Levick and heard water running inside. One officer knocked on the door to no response. Erbele and Barclay concluded that someone injured in the shoot-out might be inside and, approximately ten minutes later, Erbele called his supervisor, Lieutenant Mangini of the SWAT team.

Mangini, who arrived about fifteen to twenty minutes later, and Eberle decided that the known facts merited entry into the building and that there was

no time to secure a warrant. Within ten to fifteen minutes, the SWAT team was gathered, knocked on the door, announced their intent to check the "well-being" of the inhabitants loud enough that "everybody on [the] block [could] hear," and received no answer. App. at 202. SWAT knocked again, received no response, and entered the building.

Just inside the door, the officers found a loaded handgun. Deeper inside the house, they discovered two more guns, sixty-one kilograms of cocaine, several bags of crack cocaine, and approximately $176,365. On one desk they found one "unwrapped" and two "wrapped" kilos of cocaine, at least one baggie with crack cocaine, a heat sealer with Thompson's fingerprints, ziplock bags, a gun placed on top of a newspaper dated November 22, 2006, a notebook that appeared to be a drug dealer, and a scale with Bolger's and Thompson's fingerprints.

Investigation revealed that both Thompson and Kirkland resided at 1053 Levick. Bolger, Thompson and Kirkland were indicted for conspiracy to possess with intent to distribute cocaine and cocaine base (Count I), and conspiracy and aiding and abetting a conspiracy to maintain a house for the purposes of drug trafficking (Count II); Bolger and Thompson were indicted for possession on or about November 25, 2006 with intent to distribute cocaine (Count III) and crack cocaine (Count IV) and with aiding and abetting those offenses, and with possession, and

aiding and abetting possession, of a weapon in furtherance of a drug trafficking crime (Count V); and Thompson was indicted as a convicted felon possessing a firearm (Count VI).

A. The Motions to suppress

The defendants all moved to suppress the evidence found in the house, arguing that the warrantless search was prohibited by the Fourth Amendment because it was unreasonable for the police to believe that an injured person might have been inside 1053 Levick. The District Court held a evidentiary hearing at which Barclay testified that a witness, later identified as James Antoine, had told him at the scene that he was standing near the driveway of 1053 Levick when some men walked past, after which he heard shooting and dove under his car; after the shooting stopped, he "saw a male run down the driveway with a gun, [then go] back to a vehicle which was parked in the rear of 1053 Levick, extract a small child, run back down the driveway eastbound and then run back westbound in the driveway...[and that] he thought he saw the male run into the house." App. at 169. Erbele testified that a witness he spoke to – also presumably Antoine – said that he saw "a male holding a child, a small child...running around up by where [Antoine's] car was...and...that he said he thought he saw somebody going into [1053 Levick]." App. at 147.

The District Court denied the motions to suppress, apparently because of the evidence of exigent circumstances. Defendants moved for reconsideration on the basis of a document subsequently produced by the government that contained a summary of an interview of Antoine taken the night of the incident by an Officer Casee which purportedly contradicted the testimony of Barclay and Erbele. The Court held a second hearing at which Antoine was questioned about what he had observed regarding persons entering the Levick Street house. At one point, Antoine stated, "I don't see nothing [from] where I stand, I can see nobody." App. at 268. Pressed to clarify whether he told the police that he "saw anybody go to the back door of the1053 Levick Street," Antoine answered, "I just say I don't remember the house number, like I say I don't remember who is in the house." App. at 269. The Court then asked, "Did you point to the house?", to which Antoine answered, "Yes, right there I see that in the back but I don't remember the house." App. at 269. The prosecution followed up by asking, "When you pointed to the house, you said you saw someone go to that door?", and Antoine answered, "I don't see someone go to the door, just argue back right here, the argument right here, that's all." App. at 269-70.

Erbele also testified, reiterating his former testimony but clarifying that, after speaking with Antoine the day of the shoot-out, he did not believe that Antoine knew where the man with the child went.

The District Court again denied the motions to supress and supplemented its fact-findings by stating: "Antoine saw a male with a small child go up the driveway, return to the rear of 1053 Levick Street and then proceed towards Summerdale Avenue...Antoine [later] informed a uniformed officer at the scene...what he had seen and heard....Antoine, a Hatian, speaks with a heavy accent and is difficult to understand...Sergeant Barclay understood Antoine to report that a person with a small child may have gone not the property at 1053 Levick Street....Barclay informed [Officer] Erbele what he believed Antoine had seen." Supp. App. at 93.

B. The trial and post-trial

A jury convicted Thompson of Counts I through IV; Bolger was convicted of Counts III and IV; and Kirkland was convicted of Count II. The District Court denied Bolger's motion for acquittal. At sentencing, the Court enhanced Bolger's Guidelines calculation by two points under U.S. Sentencing Guidelines § 2D1.1 (b)(1)(2007) for possessing a dangerous weapon in connection with a drug trafficking offense.

II.

Discussion[1]

A. Suppression

Defendants argue that the evidence should have been suppressed because of the absence of a warrant. Warrantless entry into a home is permitted "to assist persons who are seriously injured or threatened with such injury." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006), but the government must show a reasonable basis, approximating probable cause, both for the officers' belief that an emergency exists and for linking the perceived emergency with the area or place into which they propose to intrude," *United States v. Martins*, 413 F.3d 139, 147 (1st Cir. 2005), *cert. denied*, 546 U.S. 1011 (2005). "We review the denial of a suppression motion for clear error as to the underlying facts, but exercise plenary review as to its legality in light of the district court's properly found facts." *United States v. Coles*, 437 F.3d 361, 365 (3d Cir. 2006). "The presence of exigent circumstances is a finding of fact, which we review for clear error." *Id.* at 366 (citation omitted).

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[1] The District Court had jurisdiction under 18 U.S.C. § 3231 and this court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

The reviewing court must make an "objective assessment of an officer's actions in light of the facts and circumstances then known to him, *Scott v. United States,* 436 U.S. 128, 137 (1978), in the light of the totality of the circumstances confronting the officers, including...a need for an on-the-spot judgment based on incomplete information and sometimes ambiguous facts bearing upon the potential for serious consequences," *Martins,* 413 F.3d at 147. The government bears the burden of proving exigency. *Parkhurst v. Trapp,* 77 F.3d 707, 711 (3d Cir. 1996).

Defendants argue that the testimony given by Barclay and Erbele is "outrageously suspect" because it conflicts with Antoine's testimony and because the officers did not note that "someone went into the house with the child" as part of "there '49,' which is their formal Police Report." Appellants' Br. At 12-13. Defendants argue further that "even if [Antoine] said that he 'thought' [he saw someone go] into the house, ...[that is] still...not enough to establish probable cause or an exigent circumstance, "because "the man who took the child was in no way tied to the shooting in question," and there "was noting...to indicate that either the man or the child was hurt in any way...[including] no blood leading in or out of the home...or other noise that might indicate an emergency..." Appellants' Br. At 13. The Defendants also assert that there was no "imminence" to whatever danger existed because the police did not "rush[] into the home to save the child that they

feared might be coming to harm." Appellants' Brief at 19.

We reject these arguments. The District Court found that Antoine and Officers Barclay and Erbele were all credible witnesses, and explained that the discrepancies between the officers' testimony and Antoine's testimony were due the Officers' difficulty in understanding Antoine's Haitian accent. This was not clear error. Both Erbele and Casee testified that they found it difficult to understand Antoine, and a fair reading of his testimony supports the genuineness of those assertions. Adding to the possible confusion, Antoine pointed at 1053 Levick while speaking with Barclay and Erbele.

To be sure, there was some confusion between the officers and about what Antoine said, but this is unsurprising considering the interviews were conduction at the scene of a shoot-out. Barclay's testimony is of debatable relevance given that Erbele spoke with Antoine after Barclay and it was Mangini and Erbele who together made the decision to enter the house, apparently based primarily on the information provided by Erbele. Sill, Erbele had the following information: (1) there was a shoot-out; (2) a witness had said adjacent to the scene of the shoot-out; (3) that person may have taken a child from the bullet-ridden Expedition, or may have been involved in the shoot-out, or both; (4) a witness told Erbele that more than one person had exited the Expedition, which had both its front doors open; and (5)

there was water running in the house, the lights were on, and no one answered when the police knocked and announced their presence. These facts made the warrantless search reasonable.

Defendants' argument about the "49" – which does not appear in the record – is unconvincing. That document apparently reflects a statement by Erbele that a "male had taken a small child from the rear of a 2004 Expedition" and that "the male fled with the small child." App. at 158. That is not inconsistent with Erbele's belief that the male could have entered 1053 Levick. Moreover, neither Erbele nor Barclay created or reviewed the 49, and both claim that they told whoever wrote that document the same information to which they testified at the suppression hearing.

We also reject Defendants' argument that there was no exigency because the officers waited for the SWAT team. The time it took to collect information, call SWAT, decide to enter the building, then prepare to do so, was reasonable. It is well recognized that police officers can take "reasonable precautions to reduce the risk of serious injury to themselves or others..." *Causey v. City of Bay City*, 442 F.3d 524, 531 (6th Cir. 2006) (quoting *United States v. Salava*, 978 F.2d 320, 324 (7th Cir. 1992)). There was evidence that it was police procedure to wait for the SWAT team to enter a building when a armed person might be inside.

Defendants argue in the alternative that, even if the police were justified in entering the house, they were not justified in going past the entryway because "they could have called out" to see if anyone was hurt and because "there was no blood found; there was no loud noise nor screaming nor anything else that would have indicated that someone needed help." Appellants' Br. At 22. Defendants further assert that "the gun [found] on the floor' by the SWAT team "is immaterial" because "it is not against the law to have a gun in the home." Appellants' Br. At 22. The presence of the gun, however, increased the possibility that someone connected to the shoot-out was inside and in need of help, and the police had already "called out" before they entered the house and received no response. We will not disturb the District Court's denial of the motion to suppress.

B. Sufficiency of the evidence

In support of their contention that they were entitled to a judgment of acquittal, Bolger and Thompson argue that a reasonable jury could not have found beyond a reasonable doubt that they possessed the drugs recovered from 1053 Levick because "mere proximity to the drug, or mere presence on the property where it is located or mere association with the person who does not control the drug or the property, is insufficient to support a finding of possession," *United State v. Brown,* 3 F.3d 673, 680 (3d Cir. 1993) (citation omitted), and because the government "failed to demonstrate that [they] possessed any of

the drugs...on any date relevant to the prosecution," Appellants' Reply Br. At 21 (citing *United States v. Hall*, 473 F.3d 1295, 1309 (10th Cir. 2007) (reversing conviction for possession of crack because "[w]hile [the] evidence [might have been] sufficient to establish that [defendant] possessed crack-cocaine at some time, the indictment charged [defendant] with possession and distribution on or about April 7, 2001...[and] [n]one of [the] evidence shows that [defendant] possessed or distributed crack-cocaine at that time.")

There was, however, substantial evidence from which the jury could convict Thompson of constructive possession of cocaine and crack on or about November 25, 2006: Thompson admits, and there was ample evidence from which the jury could infer, that he resided at 1053 Levick Street where large amounts of drugs and drug paraphernalia were found in plain sight; Thompson's fingerprints were found on the scale and on the heat-sealer, which were next to kilos of cocaine; his fingerprints were also found on a drawer of that desk which contained a bag with a chunky white substance inside; there was evidence that those items had been placed there within a day of the shoot-out, including testimony by Brenda Kirkland, the aunt of Latoya Kirkland, that she had been in the apartment the day before the shoot-out, and had seen Thompson, but that the cocaine, gun, scale, etc., were not on the desk then; there was ample testimony that Thompson was pre

sent for the shoot-out and that it was he who retrieved his young son from the Expedition; and there was a "box of money" in the bedroom indentified as Thompson's.

There was also sufficient evidence to convict Bolger of aiding and abetting: four of his fingerprints were found on the recently-placed scale which, again, was next to an open package of drugs, baggies, and a heat sealer; Bolger was shot in the driveway outside 1053 Levick where, again, drugs were set-out in plain sight; three of his fingerprints were found on a glass in the kitchen near pots which seem to have been used in cooking crack cocaine; Bolger does not dispute that his street name was "Big Homie" and the notation "BH" in the notebook *cum* drug ledger was placed next to the number "1000" and the words "last run"; there were hundreds of phone calls placed between Bolger and Thompson, twelve of which were placed between November 22 and November 24; and there was substantial other evidence connecting Bolger with Thompson and with 1053 Levick. From this evidence, the jury could infer that Bolger had been helping, or was about to help, Thompson package drugs for sale. "Actual or constructive possession need not be shown to justify a conviction for aiding and abetting possession, only 'some affirmative participation which at least encourages the principal offender to commit the offense.'" *United States v. Frorup,* 963 F.2d 41, 43 (3d cir. 1992) (quoting

United States v. Raper, 676 F.2d 841, 850 (D.C. Cir. 1982)).

C. Bolger's sentencing enhancement

Bolger argues that the District Court erred in finding that he possessed a Springfield Armory Ultra handgun found in the driveway of 1053 Levick. We disagree. It is undisputed that Bolger was present in that driveway just before the gun was discovered by the police. Also, at Bolger's sentencing, the government called Agent Monahan who testified that the Springfield was traced to a man named Frost, who had purchased guns for Tull[2] who told Monahan that the had supplied a Springfield to Bolger. Tull also told Monahan that he remembered that gun because it had three holes in the trigger because it was all-metal and was therefore particularly heavy.

This evidence suffices to show that Bolger possessed the gun during the shoot-out in the driveway of 1053 Levick. "[T]his Court...review[s] factual findings relevant to the Guidelines for clear error and...exercise[s] plenary review over a district court's interpretation the of Guidelines." United States v. Grier, 475 F.3d 556, 570 (3d Cir. 2007) (en banc).

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[2] Tull had also testified during a hearing at trial that he had sold Bolger guns.

A District Court must apply a two-level Guidelines offense level increase if "a dangerous weapon (including a firearm) was possessed" in connection with a drug trafficking offense. U.S.S.G. § 2D1.1(b)(1)(2007). "The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. 2D1.1 cmt. n.3 (2007). There is no such improbability here.

III.

Conclusion

For the above-stated reasons, we will affirm the orders of the District Court.

APPENDIX B – NOTICE OF APPEAL, DATED APRIL 23, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	: Criminal No. 07-CR-388-2
v.	:
ROMEL BOLGER	:

NOTICE OF APPEAL

Notice is hereby given that Romel Bolger, defendant above names, hereby appeals to the United States Court of Appeals for the Third Circuit from the Sentence entered in this action on the 23rd day of April, 2008, by the Honorable Timothy J. Savage, Judge, United States District Court for the Eastern District of Pennsylvania.

Joseph C. Santaguida, Esq.
121 South Broad Street
2nd Floor
Philadelphia, PA 19107
(215) 893-0900

APPENDIX C – JUDGMENT IN A CRIMINAL CASE, FILED APRIL 24, 2008

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
v.
ROMEL BOLGER

Case No. 07-388-02
USM Number: 62501-066
Joseph C. Santaguida, Esq.

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s)_____ which was accepted by the court.

X was found guilty on count(s) three, four _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses.

Title & Section	Nature of Offense	Offense Ended	Count
21:841(a)(1),(b)(1)(A)	Possession with intent to distribute controlled substances	11/25/2006	3
21:841(a)(1),(b)(1)(A)	Possession with intent to distribute controlled substances.	11/25/2006	4

JUDGMENT IN A CRIMINAL CASE

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reforming Act of 1984.

X The defendant was found guilty on count(s) One, Two and Five

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for the district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

April 23, 2008
Date of Imposition of Judgment

/s/ Timothy Savage
Signature of Judge

Timothy J. Savage, USDJ
Name and Title of Judge

April 24, 2008
Date

Defendant: Romel Bolger
Case No.: CR. 07-388-02

IMPRISIONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

One hundred ten (110) months, on each of Counts 3 and 4, to run concurrently, for a total term of 110 months.

X The court makes the following recommendations to the Bureau of Prisons:

(1) defendant shall be enrolled in a program to obtain his GED certificate; (2) defendant shall be evaluated and, if appropriate, enrolled in the Residential Drug Abuse Program (RDAP); (3) designate defendant to a facility as close to Philadelphia, Pennsylvania as possible.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Judgment executed as follows

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

United States Marshal

By _____

Deputy United States Marshal

Defendant: Romel Bolger

Case No.: CR. 07-388-02

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

Five (5) years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, ammunitition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in a approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete

3) written report within the first five days of each month;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

1. The defendant shall submit to one drug urinalysis within 15 days after being placed on supervision and at least two periodic tests to be performed at the time fixed by the Probation Office

2. The defendant shall pay a fine in the amount of $15,000.00.

3. The defendant shall be evaluated and placed in a drug aftercare treatment program at the direction of the Probation Office.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$200.00	$15,000.00	$ 0

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to be the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal

victims must be paid before the United States is paid.

Name of Payee	Total Loss	Restitution Owed	Priority

Totals $ 0 $ 0

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

X The court determined that the defendant does not have the ability to pay interest and it is ordered that:

X the interest requirement is waived for the X fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A X Lump sum payment of $ 200.00 due immediately, balance due

☐ no later than _____, or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal ____(e.g., weekly, monthly, quarterly) installments of $ _____over a period of _____(e.g., months or years), to commence _____(e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal _____(e.g., weekly, monthly, quarterly) installments of $ _____over a period of _____(e.g., months or years), to commence_____(e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____(e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

X The defendant shall forfeit the defendant's interest in the following property to the United States:

See Preliminary Forfeiture Order dated April 9, 2008.

APPENDIX D – ORDER, DATED APRIL 16, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

United States of America	:	Criminal
v.	:	No. 07-388-02
Romel Bolger	:	
	:	

ORDER

AND NOW, this 16th day of April, 2008, upon consideration of the Defendant Romel Bolger's Motion for Acquittal Pursuant to Rule 29 of Federal Rules of Criminal Procedure (Document No. 131), the government's response, and after a hearing, it is **ORDERED** that the motion is **DENIED.**

TIMOTHY J. SAVAGE, J.

APPENDIX E – ORDER, DATED DECEMBER 27th, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

United States of America	:	Criminal
v.	:	No. 07-388-1 & 2
Romel Bolger	:	
and	:	
Kenneth Thompson	:	

ORDER

AND NOW, this 27th day of December, 2007, upon consideration of the Defendants Romel Bolger and Kenneth Thompson's Joint Motion for Reconsideration of the Court's Denial of Defendants' Motion to Suppress Evidence (Document No. 108), the Court having reconsidered its denial of the motions to suppress evidence and after an additional evidentiary hearing, it is **ORDERED** that the motions to suppress are **DENIED**.

/Timothy J. Savage
TIMOTHY J. SAVAGE, J.